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Case No. 2022-0666-

IN THE COURT OF CHANCERY IN THE STATE OF DELAWARE

LUIGI CRISPO, Plaintiff, v. ELON R. MUSK, X HOLDINGS I, INC. AND X HOLDINGS II, INC. Defendants.	))))))))))	C.A. No. _____

VERIFIED SHAREHOLDER CLASS ACTION COMPLAINT

Luigi Crispo ("Plaintiff") brings this Verified Shareholder Class Action Complaint (the "Complaint") individually on behalf of himself as a stockholder of Twitter, Inc. ("Twitter" or the "Company"), and as a class action on behalf of Twitter stockholders as of April 25, 2022 (excluding Defendants) and their successors and assignees (the "Class"). Plaintiff asserts individual and class claims for specific performance of the obligation of Elon R. Musk ("Musk") and Musk's acquisition vehicles, X Holdings I, Inc., ("Parent") and X Holdings II, Inc. ("Acquisition Sub") under the April 25, 2022 Agreement and Plan of Merger by and among Twitter, Musk (as to certain provisions), Parent and Acquisition Sub (the "Merger Agreement") to purchase their Twitter shares. Plaintiff also asserts individual and class claims that Defendants' self-interested refusal to purchase the Twitter shares and related conduct is a breach of the fiduciary duty Defendants owe to Twitter's public stockholders as a result of their ownership and control of the Company. The

allegations of the Complaint are based on Plaintiff's knowledge as to himself and as to all other matters on information and belief, including from the public filings of Twitter and Musk with the United States Securities and Exchange Commission (the "SEC") and the investigation of counsel.

INTRODUCTION

1. Plaintiff holds 5,500 shares of Twitter, Inc. ("Twitter" or the "Company") stock. Under the Agreement and Plan of Merger (the "Merger Agreement"), defendants agreed to purchase Plaintiff's Twitter shares for $54.20 per share (the "Merger"), which entitles him to a cash payment of $298,100 when the Merger closes.

2. The Merger Agreement is a binding contract with Defendants signed for Twitter by Brett Taylor, Chair of Twitter's board of directors (the "Board"), for the benefit of Plaintiff and other Twitter stockholders. Because the purpose of the Merger Agreement is for Defendants to purchase the Twitter shares of Plaintiff and the Class, they are third-party beneficiaries of the Merger Agreement and have individual and class rights to enforce Defendants' obligation under that agreement to purchase those shares.

3. Through their ownership of 9.6% of Twitter's stock, their beneficial ownership as a result of the Merger Agreement, and their continued rights under the Merger Agreement, and actions taken by Defendants and Twitter based on the

Merger Agreement, Defendants have obtained majority ownership and a controlling interest over Twitter.

4. Elon R. Musk and his corporate acquisition entities planned to finance their purchase of Twitter stock from Plaintiff and the Class through a combination of bank debt, a margin loan and equity financing. Merger Agreement § 5.4. The sale and pledge of Musk's personal Tesla, Inc. ("Tesla") stock holdings would provide the majority of the margin and equity funding. After the signing of the Merger Agreement, Musk's sources of financing dwindled and the value of his Tesla stock declined significantly. The $54.20 per-share cash consideration for Twitter stock under the Merger Agreement remained unchanged. Musk developed cold feet and decided to walk away from the deal. But, having agreed to take on the foreseeable risk of a market decline (including a drop in the price of Tesla's shares), Musk is contractually prohibited from reneging on the Merger Agreement.

5. In an effort to circumvent his clear contractual obligation under Section 5.4 of the Merger Agreement to finance the Merger Consideration, Musk has fabricated several excuses which he claims let him back out of the deal. His lame rationales for reneging on his contract are without merit. On July 12, 2022, Twitter sued Musk and his acquisition entities for specific performance of their obligations to Twitter under the Merger Agreement.

6. In the Merger Agreement, Defendants agreed to purchase Plaintiff's Twitter stock, but they are refusing to do so. Therefore, Plaintiff and the Class seek specific performance of Defendants' obligation to purchase their stock for $54.20 per share. They also assert that Defendants have breached their fiduciary duty of loyalty as controlling stockholders by pursuing their financial self-interest through reneging on their contractual promise to buy the Twitter shares of Plaintiff and the Class. In addition, Plaintiff and the Class seek damages against Defendants for the harm their breaches of contract and fiduciary duty has caused and will cause the Twitter stockholders.

PARTIES

7. Plaintiff Luigi Crispo is a Twitter stockholder and has continuously held shares since the time the Merger was first publicly disclosed to Twitter stockholders.

8. Defendant Elon R. Musk ("Musk") is the direct owner of 9.6% of Twitter's stock. Musk is referred to in the Merger Agreement as "Equity Investor." He is the President, Secretary, Treasurer and sole shareholder of both Parent and Acquisition Sub, and agreed to be a party to the Merger Agreement in his individual capacity as Equity Investor with respect to his unqualified obligation to fund the Merger, among other provisions.

9. Defendant X Holdings, I, Inc. is a Delaware corporation formed on April 19, 2022, for the sole purpose of engaging in, and arranging financing for, the transactions contemplated by the Merger Agreement. Parent will provide the funding for the purchase of the Twitter stock in the Merger, but Musk must provide that funding to Parent.

10. Defendant X Holdings II, Inc. is a Delaware corporation and a wholly owned subsidiary of Parent. Acquisition Sub was formed on April 19, 2022 solely for the purpose of engaging in, and arranging financing for, the transactions contemplated by the Merger Agreement.

11. Musk, Parent and Acquisition Sub are collectively referred to herein as "Defendants" and because of Musk's ownership and control of Parent and Acquisition Sub, they are sometimes referred together herein as simply "Musk."

JURISDICTION

12. This Court has subject matter jurisdiction under 10 *Del. C.* § 341, 8 *Del C.* § 111(a), and 6 *Del. C.* § 2708.

13. Personal jurisdiction over Parent and Acquisition Sub is proper because both are incorporated under the laws of Delaware and have consented to jurisdiction by agreeing to "expressly and irrevocably submit[] to the exclusive personal jurisdiction of the Delaware Court of Chancery . . . in the event any dispute arises

out of [the merger agreement] or the transactions contemplated by [the merger agreement]." Merger Agreement § 9.10(a).

14. Personal jurisdiction over Musk is proper pursuant to 10 *Del. C.* § 3104(c)(1), because, among other reasons: (a) Musk wholly owns and formed two Delaware corporations, Parent and Acquisition Sub, and which he created for the sole purpose of acquiring Twitter, a Delaware corporation; (b) Musk agreed to undertake "reasonable best efforts" to complete the Merger, which includes the delivery of a Certificate of Merger to the Delaware Secretary of State by Parent and Acquisition Sub. Merger Agreement §§ 2.3(a), 6.3(a). In addition, through his shareholdings and power under the Merger Agreement and actions pursuant to the Merger Agreement, Musk is a majority beneficial owner and controlling stockholder of Twitter.

SUBSTANTIVE ALLEGATIONS

A. Musk's Pursuit of Twitter

15. Musk has been a Twitter user since 2010. Since then, he has tweeted approximately 18,700 times and has accrued over 100 million followers, making him one of Twitter's most prolific, and most followed, users.

16. In January 2022, Musk began secretly purchasing Twitter stock. In March 2022, Musk issued a series of tweets soliciting his followers' support for

fundamental changes in how Twitter conducted its operations. His comments made his negative view of Twitter and its content modification policies clear.

17. Also in March 20222, Musk began publicly and privately communicating with Twitter directors and officers, musing about joining Twitter's Board, purchasing the Company, or starting a competitor. On April 4, 2022, Musk filed a Schedule 13G indicating he owned 9.2% of Twitter's outstanding stock. Also on April 4, 2022, Musk and Twitter entered into a letter agreement for Musk to become a director of the Company. Musk agreed that while he served as a director and for 90 days thereafter, he would not become the beneficial owner of more than 14.9% of Twitter's outstanding stock. Twitter and Musk announced the letter agreement providing that Musk was joining Twitter's board of directors. On April 9, 2022, Musk notified Twitter that he would not be joining Twitter's board, but would instead make an offer to take Twitter private.

18. On April 13, 2022, Musk delivered a "best and final" offer "to buy 100% of Twitter stock $54.20 per share in cash" proclaiming he would "unlock" Twitter's "extraordinary potential" as a platform for free speech. Musk's initial offer was conditioned on regulatory approval, confirmatory diligence, execution of a definitive agreement and completion of financing. On April 14, 2022, Musk publicly announced his offer. In response, Twitter's Board approved a so-called poison pill (or shareholders' rights) plan. In a Schedule 13D filed April 21, 2022,

Musk announced a debt commitment letter for $13 billion, a separate margin loan commitment letter for $12.5 billion and an equity commitment letter from Musk for $21 billion, all dated April 20, 2022. Musk also publicly proclaimed that his $54.20 offer was no longer conditioned on financing or diligence. He publicly tweeted about the possibility of launching a hostile tender offer, if his offer was not accepted.

19. On April 24, 2022, Musk indicated to Twitter that his $54.20 per share offer was "binary – my offer will either be accepted or I will exit my position." Musk recognized his $54.20 offer was for the benefit of Twitter's stockholders and even said he would explore a rollover transaction "to provide further value and choice to shareholders." On April 25, 2022, the parties signed the Merger Agreement. In the joint press release issued by Twitter and Musk, Musk stated:

> Under the terms of the agreement, Twitter stockholders will receive $54.20 in cash for each share of Twitter common stock that they own upon closing of the proposed transaction.

Twitter Board Chair Bret Taylor said the Merger Agreement was "the best path forward for Twitter's stockholders." Musk described his plans for Twitter, including "defeating the spam bots." In further materials filed with the SEC and shared with Twitter employees, the Twitter Board stated that the Merger Agreement "delivers a substantial cash premium to stockholders [and] is the best path forward for Twitter's stockholders."

20. On April 26, 2022, Musk filed Amendment No. 5 to his Schedule 13D statement of beneficial ownership, stating that under the Merger Agreement Twitter would become wholly owned by Parent, which is wholly owned by Musk.

B. The Merger Agreement

21. Musk (as to certain provisions), Parent, Merger Sub and Twitter are parties to the Merger Agreement. At the time the Merger becomes effective (the "Effective Time"), Twitter will merge with Acquisition Sub, with Twitter surviving the Merger, keeping its name and remaining a Delaware corporation. Merger Agreement § 2.1. Under Sections 2.4 and 2.5, the parties agreed that the certificate of incorporation and bylaws of Acquisition Sub would become the certificate and bylaws of Twitter and Acquisition Sub's board of directors would become Twitter's board. The Twitter shares of Plaintiff and the Class "shall be converted into the right to receive $54.20 per share of Company common stock in cash" (the "Merger Consideration"). Merger Agreement § 3.1(c). Each share of Acquisition Sub shall be converted into one share of Twitter. Merger Agreement § 3.1(a).

22. Twitter will not receive any of the Merger Consideration. Parent will deposit the Merger Consideration with a paying agent "for the benefit of the holders of Company Common Stock" to be applied promptly to payment of the Merger Consideration to those Twitter stockholders. Merger Agreement § 3.2(a). If there is any investment loss on the fund containing the Merger Consideration, Parent is

required to deposit additional funds "for the benefit of the holders of Company Common Stock." Merger Agreement § 3.2(f). The paying agent will pay Plaintiff and the Class the Merger Consideration. Merger Agreement §§ 3.2(b)-(c).

23. Musk is a party to Sections 5.4, 6.2(d), 6.3, 6.8, 6.10, 6.11, 6.12 and 9.9 of the Merger Agreement. Section 5.4 of the Merger Agreement provides for the Bank Debt Financing, Margin Loan Financing and Equity Financing and further provides that these Financing Commitments "are legal, valid and binding obligations of the Equity Investor, Parent and Acquisition Sub" and are enforceable against them. Section 6.10 reinforces the obligation of Musk, Parent and Acquisition Sub to finance the purchase of the Twitter shares of Plaintiff and the Class. The Merger Agreement requires Musk to transfer Tesla shares to support the Margin Loan at an LTY Ratio not to exceed 20%. Merger Agreement § 6.10(a)(ii)(A). He is also bound by Section 6.3, which requires reasonable best efforts to consummate the transactions contemplated by the Merger Agreement and cause the conditions to the Merger to be satisfied. Under Section 6.8, Musk is not permitted to issue Tweets about the Merger which disparage Twitter or its representatives. Section 6.12 requires Musk and Parent to cause Acquisition Sub to consummate the Merger.

24. The Merger Agreement contains several provisions to ensure Defendants cannot walk away from the deal. Section 5.2(a) provides that the Merger Agreement "constitutes a legal, valid and binding obligation of Parent and

Acquisition Sub, enforceable against Parent and Acquisition Sub." There is no financing condition and few conditions to closing. *See, e.g.*, Merger Agreement §§ 7.1; 7.2. Section 6.10(e) imposes a hell-or-highwater obligation for Defendants, including Musk personally, to "take (or cause to be taken) all actions, and do (or cause to be done) all things necessary, proper or advisable to obtain the Equity Financing." Most importantly, Musk, Parent and Acquisition Sub agreed in Section 9.9 that the Merger Agreement would be specifically enforceable against them.

25. Section 8.2 of the Merger Agreement, which concerning as the effect of termination of the Merger Agreement provides in pertinent part:

> . . . except as otherwise provided in Section 8.3 or in any other provision of this Agreement, no such termination shall relieve any party hereto of any liability or damages (which the parties acknowledge and agree shall not be limited to reimbursement of Expenses or out-of-pocket costs, and, in the case of liabilities or damages payable by Parent and Acquisition Sub, would include the benefits of the transactions contemplated by this Agreement lost by the Company's stockholder) (taking into consideration all relevant matters, including lost stockholder premium, other combination opportunities and the time value of money), which shall be deemed in such event to be damages of such party, resulting from any knowing and intentional breach of this Agreement prior to such termination, in which case, except as otherwise provided in Section 8.3, the aggrieved party shall be entitled to all rights and remedies available at law or in equity.

Thus, the Merger Agreement specifically recognizes that the Twitter stockholders are intended recipients of "the benefits of the transactions contemplated by this Agreement" and are "entitled to all rights and remedies available at law or in equity" for "any knowing and intentional breech" of the Merger Agreement, including the

loss of benefits to them contemplated by the Merger Agreement, such as the "lost stockholder premium."

C. The Merger Agreement Benefits Twitter Stockholders

26. The Merger Agreement does not provide any financial benefit directly to Twitter. Twitter itself survives the merger and continues to operate. Merger Agreement § 2.1. Instead, the Merger Agreement provides for Twitter's stockholders to sell their shares to Musk, Parent and Acquisition Sub. Indeed, Twitter's July 12, 2022 Complaint[1] against Defendants notes the Merger Agreement's assurances that the "agreement would stick" were included "for the benefit of stockholders." Twitter Complaint ¶ 38. That Complaint acknowledges that "Musk refuses to honor his obligations to Twitter and its stockholders." *Id.* ¶ 1 (emphasis added). Twitter further recognizes that Defendants' conduct creates "uncertainty and delay that harm Twitter and its stockholders and deprive them of their bargained-for rights." *Id.* ¶146 (emphasis added).

27. The Merger Agreement includes numerous provisions described above that are for the benefit of the Twitter stockholders, including Sections 3.1, 3.2, 5.4, 6.3, 6.10, 6.12, 8.2 and 9.9.

28. Twitter filed preliminary proxy materials concerning the Merger on May 17, June 21 and July 15, 2022. Under Section 6.2 of the Merger Agreement,

[1] Trans. ID 67812653.

Parent has the right to review and comment on the proxy statement. Thus, Musk and his affiliates and counsel presumably reviewed the contents of the preliminary proxy materials.

29. In the July 15, 2022 Preliminary Proxy Statement ("PPS"), Twitter and its Board repeatedly recognize that Musk's acquisition of Twitter was "for the benefit of our stockholders." PPS at 54, 56. The Twitter Board acknowledged "the financial benefit of the transaction to our stockholders." PPS at 57. In a June 20, 2022 letter from Twitter's counsel to Musk's counsel, Twitter brought up Musk's April 24, 2022 threat to make his $54.20 offer directly to the Twitter stockholders "without giving them the benefit of the definitive merger agreement to protect their interest." PPS at 68.

D. Musk Is the Majority Owner and Controller of Twitter

30. Before and after the signing of the Merger Agreement, Musk directly owned 9.6% of Twitter's outstanding shares. The only larger Twitter stockholder is The Vanguard Group, a passive investor.

31. Through the signing of the Merger Agreement, Musk gained significant additional beneficial ownership and influence over Twitter. The Merger Agreement gave Musk the right to acquire the 90.4% of Twitter's stock he does not already own. The Merger Agreement is an agreement for the purpose of acquiring the Twitter

stock owned by the other Twitter stockholders. As a result of the Merger Agreement, Musk became the owner of a majority of Twitter's stock.

32. Through the Merger Agreement, Musk obtained veto power over numerous matters ordinarily reserved for the Board and Twitter's stockholders under Twitters' certificate of incorporation (the "Certificate"), bylaws (the "Bylaws") and Delaware law.

33. Pursuant to 8 *Del. C.* § 242(b), the Board and Twitter's stockholders can amend the Certificate. Under the Merger Agreement, the Certificate cannot be amended in any material respect without Defendants' consent (§ 6.1(a)).

34. Per Article VI.A. of the Certificate, the Board can amend the Bylaws. Under the Merger Agreement, the Board cannot amend the Bylaws in any material respect without Defendants' consent (§ 6.1(a)).

35. Per Article XI of the Bylaws, Twitter's stockholders can repeal, adopt and amend bylaws. Under the Merger Agreement, the stockholders cannot amend the Bylaws in any material respect without Defendants' consent (§ 6.1(a)).

36. Under the Delaware General Corporation Law Twitter may issue, split, combine, reclassify, repurchase or amend the terms of its stock. Pursuant to the Merger Agreement, Twitter cannot take such actions without Defendants' consent (§§ 6.1(b)-(c)).

37. Under 8 *Del. C.* §170, the Board can cause Twitter to issue dividends. Under the Merger Agreement, dividends cannot be issued without Defendants' consent (§ 6.1(d)).

38. Under Article V.A. of the Certificate, Section 3.1 of the Bylaws, and 8 *Del. C.* § 141(a), the Board manages Twitter. Under the Merger Agreement, without Defendants' consent, the Board cannot:

a. increase employee salaries unless "consistent with past practice" (§ 6.1(e));

b. acquire any companies (§ 6.1(i));

c. incur material debt (§ 6.1(j)); or

d. communicate with its employees, customers, suppliers and consultants unless "consistent with prior communications" (§ 6.8)).

39. Notably, Twitter, which had adopted a stockholders' rights plan on April 15, 2022, to protect stockholders from Musk's takeover, now cannot do so without his consent. Merger Agreement § 6.1(p).

E. Musk Walks Away from the Merger Agreement

40. Musk himself is largely required to finance the Merger, through a margin loan secured with his Tesla stock, a huge equity commitment, and loans made directly to Twitter. Since Musk is using Tesla shares to help finance the Merger, the more Tesla's stock price declines, the more Tesla shares Musk has to

sell or pledge to fund the Merger. Musk is well-known for his reluctance to sell Tesla shares because he wants to continue to maintain control of that company.

41. On April 23, 2022, the last trading day before the Merger Agreement was signed on April 25, 2022, the closing trading price for a share of Tesla stock was $1,005.05. After the signing of the Merger Agreement, as Musk started to sell his holdings to finance the Merger, the price of Tesla stock began to fall. By the end of the week, April 29, 2022, Tesla stock was trading at $870.76 per share. In other words, the portion of the Merger that Musk was financing through Tesla stock got 13% more expensive for Musk by the week's end.

42. On May 4, 2022, the Margin Loan Commitment was cut from $13.5 billion to $6.25 billion and Musk's Equity Funding Commitment was increased by $6.25 billion to $27.25 billion. In Amendment No. 6 to his 13D, Musk announced Co-Investor Equity Commitment Letters for approximately $7.139 billion in cash from investors on Twitter shares (valued at $54.20 per share) to provide part of the equity financing for the purchase of the Twitter stock of Plaintiff and the Class. Thus, Musk was attempting to reduce his obligation to use his Tesla stock to support the margin debt and reduce his obligation to provide equity financing which would require sale of Tesla stock.

43. Tesla's stock price kept falling, closing at $728.00 per share on May 12, 2022.

44. Musk wanted an out. But Defendants' ability to terminate the Merger Agreement was (and is) highly restricted by the terms of the Merger Agreement. One of Defendants' few possible grounds for terminating the Merger Agreement is showing that Twitter's representations in the Merger Agreement are not true and correct, causing a Material Advise Effect (an "MAE"). Merger Agreement §§ 7.2(b), 8.1(d)(i). One of Twitter's representations in the Merger Agreement, contained in Section 4.6(a), is that Twitter's filings with the SEC are materially accurate.

45. On May 13, 2022, Musk tweeted "Twitter deal temporarily on hold," and linked to a story about Twitter's May 2, 2022 disclosure in a Form 10-Q that it estimated fewer than 5% of its monetizable daily active users were "fake or spam accounts." Under the Merger Agreement, Musk had no right or authority to put the merger "on hold." This tweet violated Musk's agreement in Section 6.3 of the Merger Agreement to use reasonable best efforts to consummate the purchase of the Twitter shares.

46. To lay the groundwork for an exit from the Merger Agreement, Musk publicly claimed that the 10-Q disclosure was an admission that Twitter's SEC filings were false and misleading. On May 13, 2022, Musk made more tweets about fake accounts, misleadingly contending Twitter's estimates are based upon a

sampling of only 100 accounts. In reality, the estimates are made through review of thousands of accounts.

47. Musk continued to try to derail the Merger. On May 15, 2022, in response to another Twitter user's tweet about fake accounts, Musk tweeted that fake accounts may comprise "over 90% of daily active users." Musk repeated this statement the next day at an industry conference, hosted by the *All-In* podcast.

48. When Musk appeared at the *All-In* podcast's May 16, 2022 conference, he stated he believes the number of fake Twitter accounts is "four to five times" the 5% figure contained in Twitter's SEC disclosures. He further stated: "I am still waiting for some sort of logical explanation for the number of sort of fake or spam accounts on Twitter, and Twitter is refusing to tell us. So you know, this just seems like a strange thing. . . .they claim that they do know. And they claim they have this complex methodology that only they can understand. . . . This is a material public statement, is a Material Adverse Misstatement."

49. On May 17, 2022, Musk claimed in a tweet that at least 20% of Twitter accounts are fake and the deal could not move forward until Twitter's Chief Executive Officer publicly proved that less than 5% of accounts were fake. But the most egregious tweet came later that day when Musk, in a reply to his own post about fake accounts, tweeted "Hello @SECGov, anyone home?"

50. Tesla's share price continued to decline. On May 24, 2022, Musk scrapped entirely the margin loan secured by his Tesla stock, and increased his equity commitment to $33.5 billion. Tesla stock continued to decline, closing at $628.16 per share that day. On May 25, 2022, Musk's lawyers claimed Musk was surprised by what he considered Twitter's "tax methodologies" for determining fake or spam accounts and demanded "rigorous computer-aided and third-party testing." The letter did not explain why Musk has not conducted analysis of Twitter's methodologies and requested testing before he signed the Merger Agreement.

51. It was Musk and his tweets, not Twitter, that attracted the SEC's scrutiny. On May 18, 2022 the SEC issued comments to Musk's legal counsel concerning his 13D filings. When Musk did not respond, the SEC issued a June 2, 2022 letter reiterating those comments in writing. The SEC observed that Musk's May 17, 2022 tweet that "[t]his deal cannot move forward" suggested Musk was "exercising a legal right under the terms of the merger agreement to suspend completion of the acquisition of Twitter or otherwise do not intent to complete the acquisition." Thus, the SEC recognized that Musk was trying to back out of the Merger Agreement and demanded that he amend his 13D.

52. On June 6, 2022, Musk filed a 13D amendment attaching a letter from his counsel to Twitter, which repeated Musk's demands for information on spam and fake accounts and asserted he had a right to such information under Section 6.4 and

6.11 of the Merger Agreement. The letter asserted that Musk had the right "not to consummate the transaction" and the "right to terminate the merger agreement." Thus, Musk confirmed what was increasingly clear since mid-May: he had no intention of honoring his contractual commitment and fiduciary obligation to buy the Twitter stock of Plaintiff and the Class.

53. From late May, 2022 through early July, 2022, Musk's lawyers and Twitter's lawyers exchanged letter volleys arguing over who had breached the Merger Agreement. Not surprisingly, Twitter's efforts to provide information could not satisfy Musk, who was merely trying to fabricate an excuse for defaulting on his agreement to buy Twitter's stock.

54. Despite his clear obligation under the Merger Agreement to fund the purchase of Twitter's stock and the lack of any financing condition, during June 2022 Musk raised doubts about the Bank Debt Financing being available to allow the Merger to be consummated, including stating on June 21, 2022 that the Bank Debt Financing "need[ed] to be resolved before the transaction can complete."

55. On July 8, 2022, with Tesla stock opening at only $727.00 per share, Musk purported to terminate the Merger Agreement in a letter from his counsel to Twitter. Musk's grounds for doing so were a pretext.

56. Musk claimed Twitter violated Section 6.4 of the Merger Agreement by failing to provide Musk with information he needed to consummate the Merger,

but, as described at length in Twitter's Complaint against Defendant, Musk's information requests related to fake users were reasonably satisfied and, in any event, were for the purpose of *not* consummating the Merger. Musk's letter admitted that he chose not to seek data and information on fake users before entering into the Merger Agreement.

57. Musk also contended Twitter's disclosures about fake accounts contained in SEC filings "may have also caused, or is reasonably likely to result in," an MAE and be untrue, because, Musk believes, more than 5% of Twitter accounts may be spam of fake. Musk Termination Letter. But even if Musk is correct (and Musk provides no reason to believe he is), this does not contradict Twitter's SEC filings about spam and fake accounts, which merely disclose that Twitter's own estimate is that less than 5% of accounts are spam or fake, and Musk does not contend that is not Twitter's true estimate. Indeed, Twitter's disclosures of "false or spam accounts" being less than 5% of Twitter's mDAU have been consistently qualified by statements that the mDAU calculation "may not accurately reflect the actual number of people or organizations using our platform" and that the calculation of spam or false accounts involves "significant judgement" and "may not accurately represent the actual number . . . ."

58. Finally, Musk contends Twitter violated Section 6.1 of the Merger Agreement since some employees have resigned and Twitter implemented layoffs,

fired two employees, and implemented a hiring freeze, all without Musk's consent. But, as detailed in Twitter's Complaint, Twitter tried to engage with Musk on these issues, without any cooperation or substantive response, even though his consent cannot be "unreasonably withheld, delayed or conditioned." Merger Agreement § 6.1. Musk cannot create a breach of Section 6.1 by breaching it himself. Twitter's Complaint details the factual and legal reasons that Twitter has not breached the Merger Agreement.

59. Later that day, Bret Taylor, Twitter's Board Chair tweeted: "The Twitter Board is committed to closing the transaction on the price and terms agreed upon with Mr. Musk and plans to pursue legal action to enforce the merger agreement. We are confident we will prevail in the Delaware Court of Chancery."

60. On July 10, 2022, Twitter's counsel advised Musk's counsel that Musk's purported termination of the Merger Agreement "is invalid and wrongful, and it constitutes a repudiation of their obligation under the Agreement." Twitter asserted that Musk "knowingly, intentionally, willingly, and materially breached" Sections 6.3, 6.8 and 6.10 of the Merger Agreement.

61. Apparently aware that his termination letter would not be effective, Musk continued to try to create an MAE. On July 11, 2022, Musk tweeted images of himself with the text "THEY SAID I COULDN'T BUY TWITTER; THEN THEY WOULDN'T DISCLOSE THE BOT INFO; NOW THEY WANT TO

FORCE ME TO BUY TWITTER IN COURT; NOW THEY HAVE TO DISCLOSE BOT INFO IN COURT." This was followed by a picture of Chuck Norris and the text "Chuckmate."





62. That same day, Musk once again encouraged the SEC to investigate Twitter's disclosures, responding to a tweet suggesting that more than 5% of Twitter's users were fake by writing "Hello???@SECGov."

63. Also on July 11, 2022, Musk tweeted "Problematic" in response to a tweet about Twitter's May 2, 2022 Form 10-Q's explanation that Twitter identified, and corrected, a technical error in calculating its mDAU figures. None of the

adjustments to historical mDAU figures exceeded 0.88% of the previously reported mDAU figures.

64. Only after exhausting its options, on July 12, 2022, Twitter filed its action against Musk and his acquisition entities, seeking to enforce the Company's rights under the Merger Agreement. Twitter's Complaint acknowledges that the Twitter stockholders also have rights under the Merger Agreement.

CLASS ACTION ALLEGATIONS

65. Plaintiff brings this Action pursuant to Rule 23 of the Rules of the Court of Chancery, individually and on behalf of all other holders of Twitter common stock on or after April 25, 2022 (except Defendants and any person, firm, trust, corporation or other entity related to or affiliated with them and their successors in interest) (previously defined as the "Class").

66. This Action is properly maintainable as a class action. The Class is so numerous that joinder of all members is impracticable. According to Section 4.2 of the Merger Agreement, as of March 31, 2022, there were 763,577,530 shares of Twitter common stock issued and outstanding. Thus, upon information and belief, there are at least thousands of Twitter stockholders scattered throughout the United States.

67. There are questions of law and fact common to the Class, including, *inter alia*, whether:

a. Plaintiff and the Class are intended beneficiaries of the Merger Agreement and, therefore, have standing to sue for specific performance and breach of the Merger Agreement;

b. Defendants breached the Merger Agreement;

c. Musk breached his individual and personal obligation to fund the Merger;

d. Musk violated the Section 6.8 of the Merger Agreement and his fiduciary duties though his tweets and public statements, including those on May 13, 14, 15 and 17, and July 11, 2022;

e. Musk's control of Twitter through his large stock holding, his influence over investors (including through his tweets), his ownership and rights under the Merger Agreement and his actions since the signing of the Merger Agreement, impose fiduciary duties to Twitter stockholders on him;

f. Plaintiff and the Class are entitled to specific performance of the Merger Agreement; and

g. Plaintiff and the other members of the Class were injured by the wrongful conduct alleged herein, and, if so, what is the proper measure of damages.

68. Plaintiff is committed to prosecuting this Action and has retained competent counsel experienced in litigation of this nature. Plaintiff's claims are

typical of the claims of the other members of the Class, and Plaintiff has the same interests as the other members of the class. Plaintiff is an adequate representative of the Class.

69. The prosecution of separate actions by individual members of the Class would create the risk of inconsistent or varying adjudications with respect to individual members of the Class. Such inconsistent or varying adjudications that would establish incompatible standards of conduct for Defendants and/or with respect to individual members of the Class would, as a practical matter, be dispositive of the interests of the other members not party to the adjudication and/or would substantially impair or impede their ability to protect their interests.

70. In purporting to terminate the Merger Agreement and refusing to consummate the purchase of Twitter shares in the Merger, Defendants have acted and refused to act on grounds generally applicable to the Class, making appropriate final injunctive relief, misleading an order of specific performance, and related declaration relief with respect to the Class as a whole.

71. Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole.

COUNT I

Direct Claim for Specific Performance and Breach of Contract
(Against All Defendants)

72. Plaintiff repeats and realleges the allegations above as if fully set forth herein.

Plaintiff and the Class Are Third-Party Beneficiaries of the Merger Agreement

73. Twitter and Musk intended for the Merger Agreement to confer a material benefit on the Plaintiff and the Class. Therefore, Plaintiff and the Class are intended beneficiaries of that agreement and have enforceable rights thereunder. The Merger Agreement manifests an unambiguous intent to benefit Twitter stockholders because it provides compensation for their stock, which is to be converted into $54.20 in cash in the Merger. Furthermore, stockholder approval of the Merger Agreement was required. The specific benefits to the stockholders override the Merger Agreement's disclaimer of third-party beneficiary rights.

74. Plaintiff and the Class seek to enforce a right specifically and explicitly granted in the Merger Agreement: the right to sell their stock to Musk for cash. That right is not incidental—the overriding purpose of the Merger Agreement is for Musk to purchase the stockholders' shares through the Merger.

75. As detailed above, the terms of the Merger Agreement, the Preliminary Proxy Statement and other public statements by Twitter and Musk admit that the Merger Agreement is for the benefit of Twitter's stockholders.

76. Twitter's Complaint against Musk confirms that the Twitter stockholders are intended beneficiaries of the Merger Agreement who will be harmed by Musk's breach. *E.g.*, Twitter Complaint ¶ 1 (recognizing Musk's obligations to the Twitter stockholders and that Musk's breach is destroying stockholder value); *id.* ¶ 6 (Musk's breach seeks to shift the cost of the market downturn to the Twitter stockholders); *id.* ¶ 11 (the Twitter stockholders are entitled to "the benefit of Musk's bargain"); *id.* ¶ 36 (Musk agreed to specific performance requiring him to buy the shares of the Twitter stockholders); ¶ 38 (the Twitter Board obtained assurances in the Merger Agreement "[f]or the benefit of stockholders" in order that "the agreement would stick"); *id.* ¶ 40 ("Under the [Merger Agreement] . . . Twitter stockholders will receive $54.20 per share in cash").

77. The Merger Agreement affects the rights of the Twitter stockholders and gives them rights. Section 3.1(c) provides that their stock can be taken from them but as a substitute creates the right for them to receive $54.20 in cash as compensation. Under Section 3.5, even dissenting shares will no longer be outstanding and the right to appraisal will be substituted for the shares. Section 6.1 restricts *inter alia* the stockholders' rights to (a) amend the certificate or bylaws; (b)

have their shares repurchased; (c) receive dividends; (d) participate in a stockholder rights plan. Section 6.2(c) and Section 6.5 impinges on rights relating to notice, voting and alienability. Section 8.3 further limits the remedies available to Plaintiff and the Class if Defendants violate the Merger Agreement. The right of Twitter stockholders to have their shares purchased in the Merger is in substitution for these pre-existing rights, which are restricted by the terms of the Merger Agreement.

Plaintiff and the Class Have a Right to Specific Performance of the Obligation of Defendants to Purchase Their Twitter Shares

78. The Merger Agreement is a valid contract and Plaintiff and the Class are intended beneficiaries of that contract for the sale of their Twitter shares to the Defendants for $54.20 per share in cash. Plaintiff and the Class are ready, willing and able to sell their shares to Defendants for $54.20 per share in cash pursuant to the Merger Agreement. The balance of equites tips in favor of Plaintiff and the Class. They are victims of Musk's machinations and efforts to avoid his contractual obligation. Based on changed market circumstances, Musk suffered buyer's remorse, sought to trash Twitter, knowingly and intentionally breached the Merger Agreement and reneged on his obligation under the Merger Agreement to purchase the Twitter shares. Defendants have knowingly and intentionally breached Sections 3.1(c), 3.2, 5.4, 6.3(a), 6.10 and 6.12 of the Merger Agreement.

79. In Section 9.9 of the Merger Agreement, Defendants agreed that their failure to perform the Merger Agreement, including consummating the Merger by

buying the shares of Plaintiff and the Class, would cause irreparable harm for which monetary damages would not be an adequate remedy and that an injunction, specific performance and other equitable relief would be warranted. Defendants are sophisticated parties represented by sophisticated counsel and have agreed that specific performance is an appropriate remedy for their failure to consummate the purchase of the Twitter shares of Plaintiff and the Class pursuant to the Merger Agreement.

80. Plaintiff and the Class have suffered and will continue to suffer irreparable harm as a result of Defendants knowing and intentional breaches of the Merger Agreement and refusal to complete the purchase of their Twitter shares.

81. Plaintiff and the Class also seek damages resulting from Defendants' breaches of the Merger Agreement, including the time value of money. If specific performance of Defendants' obligation to purchase the Twitter share of Plaintiff and the Class is not ordered and accomplished, then in the alternative Plaintiff and the Class seek damages, including the lost stockholder premium, resulting from Defendants' knowing and intentional breaches of the Merger Agreement.

COUNT II

Direct Claim for Breach of Fiduciary Duty

(Against All Defendants)

82. Plaintiff repeats and realleges the allegations above as if fully set forth herein.

Musk Owes Fiduciary Duties to the Twitter Stockholders

83. Because of his direct share ownership, his right to acquire shares under the Merger Agreement, his contract rights under the Merger Agreement and his actions after the signing of the Merger Agreement, Musk and his acquisition entities are the majority /controlling stockholder of Twitter and owe fiduciary duties to the Twitter stockholders.

84. Musk acknowledges he is the owner of 9.6% of Twitter's outstanding shares. The Merger Agreement gives him the contractual right to acquire the remaining shares of Twitter. Under Delaware law, Musk is the beneficial owner of a majority of Twitter's outstanding stock. *See, e.g.*, 8 *Del. C.* § 203 (definition of beneficial ownership). The Merger Agreement contains few conditions. Twitter has acknowledged that: "As of July 13, 2022, stockholder approval of the Merger Agreement [was] the only remaining approval or regulatory condition to consummating the closing of the Merger under the Merger Agreement." As Twitter

has acknowledged at paragraph 37 of its Complaint, there is a "high level of closing certainty."

85. The Merger Agreement gives Musk substantial control of Twitter's operations and activities. Section 6.1 requires Musk's approval for a wide array of corporate actions and permits him to require Twitter to operate its business only in the ordinary course. Section 6.2 gives Musk contractual rights as to a stockholder meeting, proxy statement and proxy solicitation. Section 6.5 gives Musk contractual rights as to a sale of Twitter and recommendations of the Twitter Board. Musk thus holds veto power over stockholders' votes on certain matters, and the ability of Twitter's stockholder-elected Board to exercise its powers.

Defendants Have Breached Their Fiduciary Duty of Loyalty

86. In reneging on the Merger Agreement, acting to undermine the transaction and seeking to shift the market risk to Twitter stockholders, Defendants have pursued their own self-interest at the expense of Plaintiff and the Class. This violates Defendants' duty of loyalty.

87. Defendants' breach of loyalty will result in irreparable harm to Plaintiff and the Class and entitles them to injunctive and other equitable relief and damages. Defendants' duty of loyalty requires that they fulfill their commitment to purchase the Twitter shares or be liable for damages, including the lost stockholder premium.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment and relief in his favor and in favor of the Class, and against the Defendants as follows:

A. Declaring that this Action is properly maintainable as a class action and certifying the proposed Class;

B. Finding Plaintiff and the Class to be intended beneficiaries of the Merger Agreement;

C. Issuing an order of specific performance, requiring Defendants to comply with the Merger Agreement and effectuate the Merger;

D. Finding that Defendants violated the Merger Agreement;

E. Finding Defendant Elon Musk liable for breaches his fiduciary duties owed to Plaintiff and the Class;

F. Awarding damages to Plaintiff and the Class against all Defendants for all losses and damages suffered as a result of Defendants' wrongdoing alleged herein, in an amount to be determined at trial; together with interest thereon;

G. Awarding the Class members damages together with pre- and post-judgment interest;

H. Awarding Plaintiff the costs, expenses, and disbursements of this Action, including all reasonable attorneys' and experts' fees; and

I. Awarding Plaintiff and the Class such other relief as this Court deems just and equitable.

PRICKETT, JONES & ELLIOTT, P.A.

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